

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

February 26, 2009

1:59 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

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HEARING re AmEx's Motion to Compel Disclosure of Allegedly  
Privileged Communications and Documents

Transcribed by: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. I think you should  
3 come forward if everybody's here on the same matter. Good  
4 afternoon.

5 ALL: Good afternoon, Your Honor.

6 THE COURT: I assume AmEx is going first. Get  
7 yourselves settled and comfortable and let's go.

8 MR. BIENENSTOCK: Good afternoon, Your Honor. Martin  
9 Bienenstock of Dewey & LeBoeuf for AmEx in this --

10 THE COURT: Good afternoon, Mr. Bienenstock.

11 MR. BIENENSTOCK: We're here today pursuant to AmEx's  
12 motion dated February 20, 2009 for an order compelling certain  
13 discovery. The relief we request is an order compelling  
14 Barclays Capital to disclose in discovery communications that  
15 we submit that were either not privileged or for which the  
16 privilege was waived in connection with a conversation between  
17 Lindsee Granfield of Cleary Gottlieb and Mr. White of Barclays  
18 Capital and other material and, specifically, a document that  
19 was originally produced for us in unredacted form. It's  
20 Barclays' AmEx Bates number 004901-902. We subsequently  
21 received notice from Barclays that it was erroneous not to have  
22 redacted a portion; and that portion's been redacted. We have  
23 complied with our understanding of the protective order and  
24 don't have that anymore. We had read it and know what it says  
25 but we don't have it anymore.

1 THE COURT: Do you remember what it says?

2 MR. BIENENSTOCK: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. BIENENSTOCK: And I'm not going to tell Your  
5 Honor what it says but I'll --

6 THE COURT: I know. That would violate the  
7 protective order.

8 MR. BIENENSTOCK: I'll have some comments about it  
9 later. To start, the underlying motion in the contested matter  
10 is Barclays' request for 60(b) relief. It should be understood  
11 at the outset that nothing we say here is intended to concede  
12 or prejudice our other defenses to that motion such as that  
13 they have no standing to bring this motion in the first place.  
14 But we're in the litigation and we're dealing with the  
15 discovery issue.

16 I think there's no question and no one's raised the  
17 question that under Rule 26, the discovery AmEx seeks is  
18 reasonably calculated to lead to the discovery of admissible  
19 evidence. These are conversations, concededly, by Barclays'  
20 counsel with its people talking about the mistake for which  
21 they are asking this Court for relief. And, as Your Honor  
22 knows, some mistakes are entitled to relief; other mistakes are  
23 not. The more information you can get about what kind of  
24 mistake this was the more likely it is the Court gets to the  
25 right answer. And so, in a perfect world, if the only issue

1 was what will get the Court to the right answer, there would be  
2 no question that we're entitled to this. No one's moved, for  
3 instance, to deny our compel motion on grounds that it's  
4 irrelevant or anything of that sort.

5 What's standing in the way, potentially, of the Court  
6 having the benefit of this information is the assertion of the  
7 attorney/client privilege. And I don't have to go into the  
8 policies behind that. We're not here to argue that they're not  
9 valid policies. The only issue is whether it applies here and  
10 if it applies, whether it was waived.

11 So our initial contention is that when Barclays  
12 submitted to this Court voluntarily a declaration of Mr. White  
13 that says in unmistakable terms his understanding of his  
14 conversation with Ms. Granfield that a mistake was made, that  
15 he has disclosed the substance of a conversation, and he even  
16 said things that he went on to do as a result of that  
17 conversation, had a communication with a Mr. Chikowski at AmEx,  
18 and that having opened the door and given part of an  
19 attorney/client communication, if it was that, they cannot now  
20 close the door and say we get to use the part that we want but  
21 we're not going to tell you the rest. In sum and substance, I  
22 think that capsulizes what we're here about.

23 There are a few things that I would ask the Court to  
24 factor into its decision here. The first is that a constant  
25 theme throughout this contested matter is that Ms. Granfield

1 had a dual role. She had a role as a lawyer for Barclays. But  
2 she clearly had a role, based on the defenses that Barclays is  
3 now putting up, as a business person. For instance, one of  
4 Barclays' defenses to the instant motion is that her  
5 communication with Mr. White simply led to a conversation with  
6 Mr. Chikowski and that that's the only reason why they  
7 submitted the declaration, to show that Mr. Chikowski was  
8 advised. And that goes to one of their prongs of a 60(b)  
9 motion arguing that we were not prejudiced because we were  
10 alerted to this mistake on or about October 1.

11 Furthermore, the spreadsheet that they gave us first  
12 unredacted and then redacted had the contents of an e-mail from  
13 Ms. Granfield. Again, the spreadsheet is a business document.  
14 Ms. Granfield was clearly acting -- and the Court actually saw  
15 this up front and has personal knowledge of it, at the hearing.  
16 She was acting as a business lawyer, you know, what changes  
17 will we accept, what we won't accept. She was giving  
18 instructions to Barclays' personnel: call Chikowski, do this,  
19 do that. And she was also giving legal advice. The reason I'm  
20 making an issue of this, Your Honor, is that when you have a  
21 lawyer who's -- and there's nothing wrong and we're not  
22 contending there was anything wrong with her roles and the dual  
23 role. But when you have a lawyer stepping in and out of giving  
24 business directions, call Chikowski, put him on notice, tell  
25 him -- and dispensing legal advice, there's a high risk that

1 it's just too easy for Barclays to say oh, she was acting in  
2 her business role now. That's why Mr. White disclosed a  
3 conversation, etcetera. Oh, but over here, she was acting in  
4 her legal role. She was giving legal advice. And what she was  
5 doing seems to be, in their mind, at their election depending  
6 on what's good for Barclays. There's a danger when you have a  
7 lawyer in these two roles that the turning on and off of legal  
8 advice and what's privileged and not is an unfair prejudice to  
9 the other side. And that simply exists here. It's out in the  
10 open and we think that when that happens, this Court, as other  
11 Courts have done, have to say candidly this lawyer was really a  
12 business person and what was said all around can't be said in  
13 one instance to be legal advice and in another instance,  
14 business factual advice.

15 THE COURT: I'm interested in the argument you just  
16 made, Mr. Bienenstock, in part because I don't recall seeing  
17 any emphasis as to that issue in the briefing. It's a new --  
18 it's a fresh point.

19 MR. BIENENSTOCK: It is and I'm glad Your Honor said  
20 that because I will now have an excuse to explain why I'm  
21 raising it now when it wasn't raised earlier.

22 THE COURT: Oh, I'm glad I brought this up.

23 MR. BIENENSTOCK: It is a point I wanted to make  
24 because of the points that were put in Barclays' reply brief  
25 filed on February 24, obviously after our moving brief. And



1 I'll point the Court to a few --

2 THE COURT: So I've stepped right into the trap that  
3 you laid for me.

4 MR. BIENENSTOCK: Well, I didn't mean it as a trap.  
5 But if you had not said what Your Honor said, I would have  
6 gotten to this anyway.

7 THE COURT: I figured you would.

8 MR. BIENENSTOCK: On page 8 of Barclays' reply brief,  
9 in footnote 5, they say in the second half of the footnote:  
10 "Barclays permitted Mr. White to answer these questions." This  
11 is referring to a deposition and Mr. White, who is a lawyer at  
12 Barclays, an in-house lawyer --

13 THE COURT: I read that deposition.

14 MR. BIENENSTOCK: Okay. And he was talking about his  
15 conversation with a Ms. Simone Bunger-Pentney at Barclays. And  
16 he gave the full substance of his conversation with Ms.  
17 Pentney. And we pointed out that this is an example that  
18 Barclays is conceding that not all conversations between a  
19 lawyer and a nonlawyer are attorney/client privileged and this  
20 conversation, for instance, was not. And what Barclays says is  
21 the communication was not for the purpose of Mr. White  
22 providing legal advice but rather occurred because Mr. White  
23 wanted to understand facts concerning the mistake and  
24 designation of the American Express contracts before he  
25 contacted American Express' outside counsel.

1 Well, let's take that, for argument's sake, as a  
2 given. When Lindsee Granfield had a conversation with Mr.  
3 White, the purpose they now say was to have him call Mr.  
4 Chikowski. How is that different? They're saying it wasn't  
5 legal advice. It was -- there was a point to it, a business  
6 point: call Chikowski at AmEx.

7 THE COURT: I don't mean to break into your argument  
8 but one of the things we don't know is what happened during  
9 that conversation because of the claimant privilege. So  
10 you're, in effect, putting the business bunny in your own hat.  
11 You're saying that because that little phrase, which I suppose  
12 somebody who prepared it wishes they had expressed somewhat  
13 differently now, was included in the declaration filed by Mr.  
14 White, in effect, all aspects of the conversation between  
15 Lindsee Granfield and Mr. White are now up for grabs either  
16 because it wasn't a privileged conversation at all because she  
17 was simply acting as now a purported business advisor as  
18 opposed to counsel, which is an interesting notion, or because  
19 we're assuming that the information that was imparted is  
20 nonprivileged, nonadvisory, kind of directing the troops sort  
21 of language, you go out and call Chikowski, as if she's the  
22 field general for the deal. I don't know that any of that's in  
23 the record, is it?

24 MR. BIENENSTOCK: Two things, Your Honor, about what  
25 Your Honor just said. First, we're not making the broad

1 statement that everything in that conversation necessarily had  
2 to have been business. But we're saying anything that was said  
3 about the mistake, the alleged mistake, that we're entitled to  
4 because that was the lead on to why you should call Chikowski.

5 THE COURT: But what if, just for the sake of  
6 argument, and it's purely a hypothetical, she had said, and  
7 we'll never know if it stays privileged, Mr. White, we made a  
8 terrible mistake here. The AmEx contract is not assumable as a  
9 matter of law. We've done the research and we're satisfied.  
10 Don't tell that to AmEx because we don't want to reveal our  
11 litigation positions in advance but tell them a mistake was  
12 made. I'm making all that up.

13 MR. BIENENSTOCK: Of course.

14 THE COURT: But let's just assume that that's the  
15 nature of the conversation. That's a lawyer acting as a legal  
16 advisor to a client and providing confidential legal strategy  
17 as part of the message. How do we know what's going on here  
18 since it's inside a black box? We don't know what was said.

19 MR. BIENENSTOCK: Well, we don't know what was said,  
20 but the whole reason why we're entitled to know now about  
21 whatever was said about the mistake is that they opened the  
22 door. They --

23 THE COURT: I think that's the part I'm having the  
24 most trouble with, just so you know how I'm viewing this, which  
25 shouldn't be a surprise because I've sort of revealed my

1 thinking on this in conferences that we've had prior to the  
2 argument. It seems like a pretty innocent statement which  
3 could have been phrased entirely differently to leave Ms.  
4 Granfield out of it. And it was simply a statement to the  
5 effect that a mistake was made. That's a pretty thin read with  
6 which to open a door. But I'd like to hear how that happens.

7 MR. BIENENSTOCK: Okay. Well, the conversation she  
8 had was the predicate. They then made the affirmative decision  
9 to come to this Court and instead of submitting a declaration  
10 saying in which Mr. White says on such and such day, I called  
11 Mr. Chikowski at AmEx and said there was a mistake. He said, I  
12 had a conversation with Lindsee Granfield. And I reached the  
13 understanding that a mistake was made. And then I called Mr.  
14 Chikowski and I told him about that.

15 Had we not brought this up as a subject matter waiver  
16 doctrine, I think there can be no question that as far as  
17 Barclays is concerned, the White declaration stands for the  
18 proposition that this Court should take into account that a  
19 mistake was made. Why did they add that? They did it so Your  
20 Honor would read it. They didn't --

21 THE COURT: But --

22 MR. BIENENSTOCK: It wasn't necessary to the message  
23 to Chikowski.

24 THE COURT: I'm not sure that that's true, though,  
25 Mr. Bienenstock. As I read that declaration, it stands for the

1 proposition not that a mistake was made but that Mr. White was  
2 in a position to communicate to AmEx the position of Barclays  
3 that a mistake was made. But it doesn't say anything about the  
4 cause or nature of the mistake or whether or not the mistake is  
5 one that gives rise to 60(b) relief. It's just, in effect, a  
6 statement almost for hearsay purposes, not for proving the  
7 truth of anything but just for saying this is our position.

8 MR. BIENENSTOCK: Well, to Mr. White, it may not have  
9 said anything about 60(b) relief or it may have depending on  
10 the conversation that we don't know. But as far as this Court,  
11 AmEx and Barclays are concerned, it says legions because they  
12 could not have taken it off the list, announced a mistake and  
13 not cure it as they had been ordered to do had it not been the  
14 type of mistake that would entitle them to 60(b) relief or at  
15 least had they not believed that it was. So when they came to  
16 this Court and they said -- and Mr. White says, hey, I had a  
17 conversation with Ms. Granfield and a mistake was made, unless  
18 he was talking about a mistake entitling Barclays to 60(b)  
19 relief, it would be irrelevant and immaterial. So clearly,  
20 they were using it in this court to say it's a mistake that  
21 entitles us to relief.

22 THE COURT: I think I'm not communicating clearly.  
23 I'm not disagreeing with anything you've just said, Mr.  
24 Bienenstock. But I don't see the statement that we're now  
25 focusing on as going to the question of the nature of the

1 mistake or legal rights that might arise by virtue of the  
2 mistake so much as when a certain notice was given of legal  
3 position, October 1, 2008, which is when all this is being  
4 dated. And so, I hear you but I think you also understand that  
5 I'm having some conceptual trouble getting into the text and  
6 seeing this as being substantive. I see it as a notification  
7 of a legal position without necessarily going to be merits of  
8 the legal position. But please continue.

9 MR. BIENENSTOCK: Okay. Barclays has contended after  
10 they saw where we were going that the sole purpose of the  
11 declaration was to show that they put Mr. Chikowski on notice  
12 and that -- and when Mr. White was deposed, he said, I didn't  
13 get my understanding a mistake from Ms. Granfield. I got it  
14 from Ms. Simone -- I think Bunger-Pentney. I may get the name  
15 wrong.

16 THE COURT: I know who you mean.

17 MR. BIENENSTOCK: And he recounted his conversation  
18 with her and he said very crisply, I asked her if this was a  
19 mistake and she put me on hold and she came back and checked  
20 the list and said it's not on the list, should not have been  
21 assumed. And then it turned out when we deposed her said not  
22 only did she not remember the conversation, she didn't know of  
23 any list she could have checked. This changing story is  
24 consistent throughout Barclays' positions. Clearly, they would  
25 like Your Honor to believe what Your Honor said, that this was

1 all about putting Mr. Chikowski on notice. Nothing about legal  
2 advice was ever intended; it was a mistake. But clearly, as  
3 far as Mr. White is concerned, either the actual mistake was  
4 something that he wasn't satisfied with with Ms. Granfield and  
5 believes that he had another conversation to check that out, or  
6 he made it up and could have been innocently but just his  
7 recollection is totally wrong because it's awfully strange that  
8 the person he said he spoke to never remembers the conversation  
9 or that there was a list she could have checked and he was  
10 quite specific.

11 So given that there's a lot of doubt on his  
12 recollection of the mechanics of the mistake, one can only  
13 conclude that the declaration he submitted, based on the  
14 conversation with Ms. Granfield, was really about urging this  
15 Court to believe there was a real mistake entitling Barclays to  
16 60(b) relief.

17 On page 9 of Barclays' response at the bottom, they  
18 say despite the fact that Barclays has not divulged any legal  
19 advice rendered or the content of a communication between Mr.  
20 White and Ms. Granfield, they're doing the opposite of what  
21 Your Honor is saying. They have -- there's a declaration that  
22 they drafted, that Barclays' lawyers drafted, providing  
23 information based on a conversation with Mr. White and Ms.  
24 Granfield about a mistake and they say there was no legal  
25 advice divulged. Well, of course there was legal advice. The

1 legal advice that there was a mistake that had to qualify for  
2 60(b) relief or they wouldn't be up to this in the first place.  
3 So, in effect, their reply brief, by this mistake on page 9, is  
4 conceding that if legal advice was given then the waiver does  
5 come into place. And it's so obvious it had to have been given  
6 because there was no purpose to have that conversation if the  
7 type of mistake wouldn't entitle them to 60(b) relief.

8 THE COURT: Well, I think the whole sentence or the  
9 full introductory clause is simply saying that the conversation  
10 is not being relied on to support the claimant mistake.

11 MR. BIENENSTOCK: And that's another excellent point,  
12 Your Honor. It's not now because they know if they do it now,  
13 they lose this motion. It was when they submitted the  
14 declaration. This is the point, bobbing and weaving. When one  
15 root doesn't work, they cut it off and they go to another.  
16 They submitted this declaration in advance of the hearing on  
17 mistake, on 60(b) relief. When that didn't -- when they didn't  
18 get the relief they asked for at that hearing then we went into  
19 discovery, suddenly that declaration wasn't about mistake  
20 anymore. It was about that they notified Mr. Chikowski. And  
21 now they say and, by the way, it wasn't legal advice. Well, we  
22 know it was legal advice; it had to have been. Otherwise,  
23 there was no point in giving it.

24 And so, it cannot be that the law on the subject  
25 matter waiver doctrine is that you haven't waived the doctrine



1 if after it's brought to your attention -- you haven't waived  
2 the privilege if after it's brought to your attention, you say  
3 you'll no longer rely on that. They did rely on it; that's why  
4 it was there. They were hoping this Court on that day in this  
5 courtroom was going to say I read the declaration of Mr. White,  
6 he says it was a mistake, that's evidence of mistake. Weighing  
7 everything, I find by the preponderance of the evidence that it  
8 was a mistake.

9 THE COURT: I can tell you, based upon my review of  
10 his declaration, I could never have come to that conclusion.

11 MR. BIENENSTOCK: Thank goodness. But certainly,  
12 that's the only reason they had to put it there. They had lots  
13 of other evidence that they gave that AmEx curtailed service,  
14 that they told AmEx. Lindsee Granfield sent an e-mail, it's in  
15 part of that package, to someone that there was a mistake as to  
16 the cure amount of eighteen million. So clearly, that  
17 declaration of Mr. White was purely surplusage if it wasn't  
18 there to urge mistake.

19 And looked at it a different way, Your Honor, what  
20 other evidence had they given of mistake? They had the  
21 Granfield e-mail about the eighteen million cure amount. But  
22 as to mistake of putting it on the list because it's a contract  
23 they didn't really want, they had nothing else. That was the  
24 evidence. And I agree with Your Honor. They could not have  
25 won based on that. But that could be the only reason why it

1 was there, hoping Your Honor would buy that declaration a  
2 mistake.

3 Barclays then goes on, on page 11 of its reply, to  
4 say "The Second Circuit has explained a party will only be  
5 found to have waived its attorney/client privilege by putting a  
6 communication at issue by relying on privileged advice from its  
7 counsel to make his claim or defense." Well, as I just  
8 explained, given that they had no other evidence of mistake at  
9 that hearing where they thought this Court was going to rule up  
10 or down, it's clear they were relying on that to certainly  
11 help, if not be dispositive, of convincing this Court that  
12 there was a mistake. And now, there's a realignment of the  
13 facts given that they know that that would cause a subject  
14 matter waiver doctrine to apply.

15 Now just a few other points I wanted to mention, Your  
16 Honor. In respect of the now redacted document, Your Honor, we  
17 ask that Your Honor look at that in camera, we do remember what  
18 it says. And I said earlier, I'm obviously not going to state  
19 it. One of the fundamental issues in this case, the legal  
20 issues, is whether it's a ministerial computer type mistake, as  
21 they originally thought, or whether it's a business judgment  
22 mistake where after they make a business judgment, they think  
23 about some more and come to a different business judgment. And  
24 as Judge Posner's decision in the UAL Corp. shows, the latter  
25 mistake doesn't qualify for 60(b) relief. And it's logical why

1 it couldn't because then anyone could always get that relief.  
2 Just say I changed my mind, come to a different business  
3 judgment. When Your Honor sees that, Your Honor will know one  
4 way or the other. On that issue it'll be dispositive.

5 It's on a spreadsheet that was clearly used in  
6 Barclays' business. The notion that it wasn't a series of  
7 facts, Barclays reasons one way or the other for doing certain  
8 things, is impossible. They were the factual reasons. And so  
9 on that, what we submit is wasn't privileged in the first  
10 place. And on that, we also ask Your Honor to take into  
11 account the fact that Ms. Granfield was acting as business  
12 person and lawyer in a dual role. And while there was nothing  
13 wrong with that, that cannot -- if a business person at  
14 Barclays had written onto the spreadsheet the business reasons  
15 why the contracts were on the assumed list, there'd be no  
16 question we'd get that in discovery. Not basis for redaction.  
17 The fact that a lawyer, acting as a business person, was the  
18 scribe or wrote those business reasons for them and they put it  
19 on a spreadsheet should not make a difference.

20 THE COURT: Let me ask you a couple of questions  
21 about this discreet issue of the one document that was  
22 inadvertently delivered and then pulled back and now becomes  
23 the subject of this somewhat free standing privilege issue.  
24 Assuming for the sake of argument that legal advice of retained  
25 counsel is copied into a spreadsheet and is disseminated only

1 to individuals who are within the Barclays deal team, and so,  
2 in effect, it's the client, it's not your position that the  
3 fact that it was copied into a business record deprives it of  
4 attorney/client content.

5 MR. BIENENSTOCK: That's right.

6 THE COURT: Okay. Is it your principal argument that  
7 the reason that this redacted material, and I have no idea what  
8 that material includes at this point, should be revealed to  
9 AmEx is that even though the author of that material was  
10 Lindsee Granfield acting as outside counsel, that's actually  
11 not the capacity in which she wrote it, she was writing it more  
12 in the same fashion that a business person for Barclays could  
13 write down the same information and that in order to find that  
14 it's discoverable, I need to conclude that Lindsee was not  
15 acting in a capacity as a lawyer when she wrote that? Or is  
16 there another reason why it should be disclosed?

17 MR. BIENENSTOCK: I think Your Honor would only need  
18 to conclude that what she was writing down was not for the  
19 purpose of legal advice; she was writing down Barclays'  
20 business reasons.

21 THE COURT: Okay.

22 MR. BIENENSTOCK: And Your Honor was actually a  
23 personal witness to some of this in the courtroom because on  
24 that night of the sale hearing, Your Honor asked her certain  
25 questions which were business reasons. Basically, would

1 Barclays go forward this way or that way. And she responded  
2 frequently without taking time to go talk to her client to get  
3 directions.

4 THE COURT: It was a tough night for all of us.

5 MR. BIENENSTOCK: It was a tough night for all of us.  
6 But it further shows that this was a case where you had lawyers  
7 in a dual role acting as business persons also and they can't  
8 cloak the business function with their attorney role.

9 I think there was just one other point I wanted to  
10 make. My colleague has reminded me that when it comes to a  
11 lawyer writing down something or communicating something, for  
12 the privilege to attach, there has to be an expectation and  
13 some manifestation that there's a privilege as opposed to  
14 treating it like any record that can be shown to anyone. I  
15 think by its nature, when Your Honor sees the spreadsheet and  
16 everything else, you'll see there's no indication of  
17 attorney/client privilege or sensitive document or do not show.  
18 This was a business record that could be disclosed to anyone at  
19 any time.

20 THE COURT: By the way, just for my edification --

21 MR. BIENENSTOCK: Right.

22 THE COURT: -- can you explain the providence of the  
23 document in the sense that how the document was used within  
24 Barclays, who received copies of it, whether it was treated as  
25 an ordinary business record or whether it was dignified in some

1 fashion because of the nature of the subject matter?

2 MR. BIENENSTOCK: I personally can't but if Your  
3 Honor would give me a minute, I can find out.

4 THE COURT: It may be that Barclays, during their  
5 argument, can help me with that question.

6 MR. BIENENSTOCK: Could I just have one minute?

7 THE COURT: It's fine. But I think Mr. Feldberg may  
8 turn out to be the best source for information on that.

9 (Pause)

10 MR. BIENENSTOCK: Your Honor, what we know is that it  
11 was disseminated to both people at Lehman and Barclays based on  
12 the e-mail addresses that were also there. We don't know  
13 anything more about how they were using the document.

14 THE COURT: And is there any argument for AmEx that  
15 to the extent this was privileged, that the privilege was  
16 waived through dissemination to nonclient Lehman?

17 MR. BIENENSTOCK: Well, that's -- yeah. That was  
18 the --

19 THE COURT: That's the point.

20 MR. BIENENSTOCK: That's the point.

21 THE COURT: Got it.

22 MR. BIENENSTOCK: Also that it was not expected to be  
23 a confidential document.

24 THE COURT: Okay.

25 MR. BIENENSTOCK: Thank you.

1 THE COURT: At some point before ruling on this  
2 matter, I do want to see the document. Is there any issue with  
3 my seeing in camera the document in question?

4 MR. FELDBERG: No, Your Honor. We have the copy for  
5 Your Honor.

6 THE COURT: Fine. Well, at some point, I'll take a  
7 break and I'll take a look at it.

8 MR. FELDBERG: Your Honor, Michael Feldberg from  
9 Allen & Overy for Barclays. Just to deal with the last point  
10 first, if I may, the cover memorandum with respect to the  
11 single document that we produced inadvertently if it is  
12 challenged in this application, the cover e-mail, which is from  
13 an individual at Barclays to a number of individuals, some of  
14 whom have Barclays e-mail addresses and some of whom have  
15 Lehman e-mail addresses but it may be that a number or perhaps  
16 all of the Lehman people, the people with Lehman e-mail  
17 addresses, had by that point, September 24th, moved over to  
18 Barclays, includes the -- as its last substantive line, and  
19 this is on the redacted version, "and a summary of our notes  
20 from our meeting with legal and Cleary this morning". That's  
21 the legend that is on the text of the covering e-mail. That is  
22 available.

23 MR. BIENENSTOCK: Your Honor, I don't want to  
24 interrupt. But just so it's not mistaken, that's not the  
25 document we're referring to.

1 THE COURT: Now I'm confused.

2 MR. FELDBERG: Me, too.

3 THE COURT: Or Mr. Feldberg is confused.

4 MS. GORDON: Can I try to clarify, Your Honor? There  
5 was an e-mail that attached a number of different documents.  
6 This spreadsheet was entitled "Vendors at Risk". The e-mail  
7 that Mr. Feld -- the document that Mr. Feldberg's talking about  
8 was the fourth document that was attached. That was a summary  
9 of a legal conversation between Cleary and Barclays and that  
10 was also redacted, subsequently called back. But that's not  
11 the same document that we're talking about here.

12 MR. BIENENSTOCK: We're talking about the "Vendors at  
13 Risk" document.

14 THE COURT: I understand that. Let's do the  
15 following. Since I don't think the cover memo, even if it  
16 applies to the "Vendors at Risk" document, is all that helpful  
17 to determining the question of whether or not the redacted  
18 materials should or should not be fully disclosed, I'm going to  
19 treat this little episode as if it didn't happen. And we're  
20 going to start over 'cause I don't think it matters.

21 MR. FELDBERG: Okay. Fair enough, Your Honor. Your  
22 Honor, we believe the facts lay out as follows. The principal  
23 purpose of the submission of Mr. White's declaration, which was  
24 in reply to American Express' response to our Rule 60(b)  
25 motion, was to present his view of the conversation that he had



1 with Mr. Chikowski on October 1st. Mr. Chikowski had submitted  
2 an earlier declaration recounting his recollection of that  
3 conversation. Mr. White had a different recollection; he  
4 presented that view in his declaration. Now, Mr. White had had  
5 no prior contact with this controversy before October 1st. And  
6 there is a paragraph in his declaration in which he says "I  
7 spoke with Ms. Granfield. After the conversation I  
8 understood." It gives context because before that  
9 conversation, he knew nothing about this as was made clear in  
10 his deposition. The verbal formula after "I understood" is a  
11 form of verbal formula, one of several that are used, to give a  
12 little context and to explain without divulging, certainly,  
13 without trying to divulge, the content of an otherwise  
14 privileged conversation, how we get from A to B. He learns a  
15 little bit about the controversy. He goes on to have a  
16 conversation first with Ms. Bunker-Pentney, as to which we've  
17 made no objection to discovery, then with Mr. Chikowski  
18 representing American Express, again, a fully discoverable  
19 conversation.

20 AmEx argues that the consequence of this is a full  
21 subject matter waiver as to all communications on the subject  
22 matter of a mistake whether the communication involved factual  
23 information, legal advice or whatever. The heart of the  
24 argument that we understood from the papers and a part of  
25 counsel's argument today is the notion that Barclays is relying

1 on the Granfield/White conversation to establish the fact of  
2 mistake and the nature of the mistake. They're saying we're  
3 using the conversation as a sword; therefore, we can't shield  
4 it.

5 The simple response to that factual, Your Honor, is  
6 that's not what we're doing. Mr. White is not a witness to the  
7 mistake or the nature of the mistake. He had no involvement in  
8 this matter prior to October 1st. He got involved on October  
9 1st, in part on his own initiative because somebody had to call  
10 Mr. Chikowski to tell American Express what Barclays' position  
11 was. And he took it upon himself to do that. And he needed a  
12 little bit of understanding so he would be able to engage in  
13 that conversation. He can't be a witness to either the fact of  
14 the mistake or the nature of the mistake because he was not  
15 involved at that time. And he was not a decision maker as to  
16 what should or should not have been on the closing day  
17 contracts list. Those are, we believe, the pertinent facts.

18 With respect to the law of privilege and how it plays  
19 out with these facts, we believe that the law makes clear that  
20 while facts themselves are not privileged and witnesses, be  
21 they lawyers or lay people, may be asked about their knowledge  
22 of facts -- and Mr. White was. In many places in his  
23 deposition -- Your Honor indicated that you've read it so  
24 you're familiar with this. He was asked without objection,  
25 without direction not to answer, his understanding of facts at

1 various points in time and he answered those questions. What  
2 the law does protect is the communication of information  
3 between attorney and client acting in an attorney/client  
4 relationship. There are historical policy reasons for that  
5 having to do with the free flow of information between attorney  
6 and client and the ability of clients to be candid with counsel  
7 and counsel to be candid about what the law requires and  
8 permits. It's the communication of facts that we learn from  
9 Upjohn and other cases that we've referred to in our papers, is  
10 not privileged -- is -- excuse me, is privileged and cannot be  
11 disclosed.

12 Now, AmEx has been free to ask Mr. White his  
13 understanding of facts. We've identified a number of people  
14 who were involved in the actual circumstances that led to the  
15 mistaken listing of the AmEx contracts. AmEx has indicated  
16 that it would like to take depositions from many of them. Some  
17 of those have happened; some are still to happen. They are  
18 free to inquire of those people what their understanding of the  
19 relevant facts were and what they did and how they did it and  
20 why they did it, etcetera. But we have not put the  
21 conversation between Granfield and White on October 1st in  
22 issue as to our claim of privilege. We're not relying on it in  
23 the way that the Second Circuit in the Erie v. Pritchard case  
24 last October says is required for there to be a waiver. By  
25 giving context, by just saying what he knew so that he could

1 speak to Mr. Chikowski, even though he had had a conversation  
2 with Ms. Granfield, he certainly -- we certainly did not intend  
3 to waive. And this is a form of verbal formula that perhaps  
4 won't be used quite as often in the future but is often used to  
5 give context to the substance of the communication which was  
6 Mr. White's communication with Mr. Chikowski.

7 Sometimes the line isn't as bright as we practicing  
8 lawyers would like it to be. With respect to Mr. White's  
9 conversation later that day with Simone Bunger-Pentney, it was  
10 our view of that conversation that he was simply trying to get  
11 some facts, confirm some facts so that he could have as  
12 meaningful a conversation as possible with Mr. Chikowski. We  
13 did not view that conversation as the rendering of legal advice  
14 or the seeking of legal advice by Ms. Bunger-Pentney. And  
15 therefore, we made the judgment call, allow the inquiry, don't  
16 block it. It's a judgment call we made. We believe it's the  
17 right call under these facts. The fact that Ms. Bunger-Pentney  
18 does not recall this thirty-five second conversation is, I  
19 suppose, part of the evidentiary mix in this case but of no  
20 particular significance beyond that.

21 THE COURT: Well, we don't know yet how significant  
22 it is. We'll find out.

23 MR. FELDBERG: Right. But doesn't go to the issue of  
24 whether there's been a waiver of some kind. It's simply Mr.  
25 White recalls the conversation. He recalls it being brief. We

1 made a judgment call that it was not an attorney/client  
2 conversation.

3 THE COURT: Although it was a conversation between an  
4 attorney and a business person at the client.

5 MR. FELDBERG: It certainly was, Your Honor. We made  
6 the judgment that at least as we understood it, it was not a  
7 conversation in which the attorney was rendering or the client  
8 was seeking legal advice. And therefore, we allowed the  
9 inquiry.

10 THE COURT: Is it your position that in the context  
11 of Lindsee Granfield's discussion with Mr. White, which is the  
12 principal focus of all of this energy, that Ms. Granfield was  
13 rendering advice to her client or was she potentially, as Mr.  
14 Bienenstock suggested, simply in the guise of a lawyer acting  
15 really as the business field general of a massive transaction?

16 MR. FELDBERG: It's our view she was acting as a  
17 lawyer, Your Honor, and rendering legal advice. Now -- and the  
18 communications that she engaged in were part of the overall  
19 attorney/client relationship and part of the legal advice that  
20 she was rendering. Now, American Express has raised, as we all  
21 recognize, a new argument today that that is not in their  
22 papers which is that Ms. Granfield was acting under the  
23 business person rather than lawyer hat. While I can't claim  
24 that I've read every case there is, I'm not aware of any  
25 case --

1 THE COURT: Not only can you not claim it, I know you  
2 haven't.

3 MR. FELDBERG: Fair enough. I've not read a case  
4 that I can think of that stands for the proposition that  
5 counsel, in a situation like the one Ms. Granfield found  
6 herself in representing a client making an acquisition in the  
7 context of a bankruptcy proceeding, is deemed to be acting as a  
8 business person as opposed to a lawyer. If it's appropriate to  
9 try to research whether there's any precedent for such an  
10 argument, we'll of course do so. But I can't recall any case  
11 that I've come across that stands for that proposition, and I  
12 think it would be a surprising notion that a counsel conducting  
13 a complex issue, such as the one Ms. Granfield and her  
14 colleagues from Cleary Gottlieb were conducting, step in and  
15 out of their roles as lawyers and in and out of the role as  
16 business person and somehow the Courts are put in the position  
17 of having to try to parse which hat counsel was wearing at a  
18 particular moment in a particular conversation. I think that's  
19 a difficult task. I've not seen Courts put in a position of  
20 having to try to sort all of that out. It would be a  
21 challenging task to try to do so.

22 It's our position that she was acting as a lawyer.  
23 She was Barclays' lawyer. She had been engaged to give and she  
24 did give legal advice.

25 THE COURT: Anything more?

1 MR. FELDBERG: Unless Your Honor has further  
2 questions, I have nothing further.

3 THE COURT: Nothing at this time. Mr. Bienenstock,  
4 you have anything more?

5 MR. BIENENSTOCK: Yes, Your Honor. Going back to the  
6 conversation of Ms. Granfield and Mr. White, I want to point  
7 the Court's attention to the declaration of Eugene Chikowski  
8 dated October 27, 2008 and, specifically, to page 7, paragraph  
9 22. In this declaration, Your Honor, Mr. Chikowski says "Mr.  
10 White informed me that Barclays had determined to 'go in  
11 another direction' that Barclays no longer wanted to continue a  
12 business relationship with AmEx and that Barclays has decided  
13 to reject the two AmEx contracts for business reasons." The  
14 paragraph goes on. So the state of the record before Your  
15 Honor now is, number one, Ms. Granfield spoke to Mr. White on  
16 October 1. As Mr. Feldberg noted just a few moments ago, prior  
17 to October 1, Mr. White had no knowledge of this alleged  
18 mistake or the contracts. It was the same day that Mr. White  
19 picked up the phone and called Mr. Chikowski. So the only  
20 knowledge he could have had about the mistake was what he  
21 learned from Ms. Granfield. At least, he's offered nothing  
22 else. He said that he did confirm with Ms. Simone  
23 Bunger-Pentney and, of course, we have that she doesn't  
24 remember it. But clearly, he doesn't say that she gave him any  
25 business reasons.

1           So the state of the record, as of right this moment,  
2           is that Mr. White obviously learned these business reasons from  
3           Ms. Granfield. That is not legal advice; those are facts.  
4           Those are exactly the types of things that we're entitled to  
5           discover, what were Barclays' business reasons. So although we  
6           submit, as Your Honor knows, that that declaration at that time  
7           was being relied on by Barclays to establish a mistake in front  
8           of this court, notwithstanding that they've now changed course  
9           because that would invoke the subject matter waiver doctrine.  
10          Even if Your Honor does not buy the waiver argument at that  
11          time, the evidence in front of the Court is that these were  
12          business reasons not legal advice being discussed, why Barclays  
13          didn't want these contracts. Those are facts that we're  
14          entitled to.

15                 THE COURT: Let me ask you something, Mr.  
16                 Bienenstock, because I have this mental image of a conduit.  
17                 And somebody at Barclays is making a business judgment or some  
18                 group of people at Barclays is making a business judgment  
19                 concerning those contracts to put on the list or select off the  
20                 list. And it's all happening in a very intense environment of  
21                 getting a deal done at a time of extraordinary emergency which  
22                 we all recall and we'll probably never forget.

23                 But let's just assume something for a moment which I  
24                 think is probably true. Business people, not Lindsee  
25                 Granfield, are in the process of deciding what to include and



1 what not to include on the list unless it's being delegated to  
2 other people who are subordinate to Lindsee Granfield within  
3 Cleary or some other law firm. As a result of a sudden  
4 recognition, and I don't know what the source of that  
5 recognition is, someone within Barclays comes to the  
6 realization that a terrible mistake has been made. That's why  
7 we're here. And presumably, through some means of  
8 communication, passes that information through a chain of  
9 people that ultimately gets to Lindsee or perhaps it goes  
10 directly to Lindsee. I don't know the facts. She contacts Mr.  
11 White. Mr. White contacts Mr. Chikowski and we have a  
12 litigation.

13 To the extent that the information is absolutely  
14 accessible from sources within Barclays, those individuals who  
15 did the work and who simply said to counsel, we've got to get  
16 this to counsel for AmEx. I guess we have to go through  
17 lawyers to do that and that's what they do. We seem to be  
18 threading a needle here. We're taking information which is, at  
19 least in my understanding of how it probably works, completely  
20 accessible from nonlawyer sources and we're taking the position  
21 that because it passed at one point through the mouthpiece of  
22 Lindsee Granfield's telephone that it somehow opens up  
23 everything that she ever did as a lawyer with respect to the  
24 subject matter. That seems extreme to me.

25 MR. BIENENSTOCK: We agree. And that's not what

1 we're asking.

2 THE COURT: Okay. What are you asking?

3 MR. BIENENSTOCK: Okay. We're asking to go into her  
4 conversation with Mr. White on October 1.

5 THE COURT: Just that?

6 MR. BIENENSTOCK: And for the other document, the  
7 redacted material. Now, I'd also like to supplement what Your  
8 Honor has said as the facts because this is not based on the  
9 happenstance that something came through Ms. Granfield's  
10 telephone. Two acts totally in Barclays' control occurred  
11 after that. They submitted a declaration to this Court  
12 alleging mistake for the hearing at which they thought this  
13 Court was going to deal with the merits. And there's another  
14 fact. And this is a perfect example of we all sometimes ignore  
15 the obvious. What did Mr. White do with the information he got  
16 from Ms. Granfield? He blabbed it Mr. Chikowski. Mr.  
17 Chikowski's affidavit says he told me about business reasons.  
18 The client wasn't treating it as confidential. The client  
19 wasn't treating it as legal advice. So we have two acts by  
20 Barclays, the declaration that they were hoping this Court  
21 would buy hook, line and sinker, and Mr. White's blabbing it to  
22 Mr. Chikowski who put it into a declaration. We know the  
23 information he got from Mr. White had to come from Ms.  
24 Granfield because he had no knowledge before that day. And the  
25 only two conversations he said he had were Granfield and Ms.

1 Simone Bunger-Pinkley (sic). Sorry.

2 THE COURT: I'm not sure that's her name --

3 MR. BIENENSTOCK: Okay.

4 THE COURT: -- but it's close enough.

5 MR. BIENENSTOCK: Thank you. So if this were a case  
6 where we were saying someone mentioned two business facts to  
7 Ms. Granfield, attorney/client waiver, we're entitled to  
8 everything, that would be one thing. But when Ms. Granfield  
9 then puts a conversation or a snippet of the conversation with  
10 Mr. White in a declaration and Mr. White then takes information  
11 he could only have gotten from Ms. Granfield and tells it to  
12 AmEx's Mr. Chikowski, now you don't have the attorney/client  
13 privilege anymore. And given that and the fact that all of  
14 this that they're asserting has only one impact and that's to  
15 stand in the way of this Court getting at the truth, we submit  
16 the only right decision for this Court to make on these facts  
17 is that we're entitled to the whole story because the Court's  
18 entitled to it.

19 THE COURT: Well, it's an interesting proposition  
20 that you're advancing because what you're really telling me is  
21 that Mr. Chikowski knows everything that he knows because of  
22 what Mr. White told him. And Mr. White told him what he knew  
23 and the only source of what he knew is what Ms. Granfield told  
24 him. So that's the conduit I was talking about. And, in  
25 effect, don't you already know through Mr. Chikowski's own

1 recollection, although it may be the subject of a dispute at  
2 some point, what it is that Mr. White blabbed? And so, to the  
3 extent that that's already in the record -- I'm having a hard  
4 time understanding how you're prejudiced if you don't find out  
5 other things that may have been discussed at the same time and  
6 in the same conversation. And I'm not suggesting that you  
7 aren't, for Rule 26 purposes, entitled to seek it. But I'm  
8 having a hard time understanding why you need it or why we're  
9 spending, frankly, what, with respect to the parties, is a  
10 really disproportionate effort to get at one conversation which  
11 does not yet to me appear critical to the truth finding  
12 process, as you described it, because I see so many other  
13 relevant sources of information. And I totally agree with you  
14 that the White affidavit is not self-sustaining for purposes of  
15 proving mistake. At least, wasn't to me. And the reason we're  
16 in this discovery and evidentiary hearing process is, in part,  
17 because I really do want to know what the truth is. But I'm  
18 having a hard time understanding how what was said by Ms.  
19 Granfield to Mr. White, for how ever long that conversation  
20 took place and whatever subjects may have been covered beside  
21 mistake advances the ball of getting to the truth.

22 MR. BIENENSTOCK: Several responses, Your Honor.  
23 First, I want to correct something. I had not said that Mr.  
24 Chikowski -- everything he knows comes from Mr. White. What  
25 paragraph 22 of his declaration recounts is what Mr. White

1 said. We know --

2 THE COURT: I'm sure he knows lots of other things,  
3 too.

4 MR. BIENENSTOCK: Right. Well, but -- including --  
5 could be about this. But what -- the point was that what Mr.  
6 Chikowski learned from Mr. White, Mr. White could only have --  
7 on the subject of the AmEx contracts -- could only have been  
8 learned from Ms. Granfield because he didn't know about it  
9 before that day. And he didn't learn anything more from the  
10 other Barclays employee that he recalls calling.

11 Now to get to Your Honor's inquiries. There are  
12 several things that AmEx has raised in connection with the  
13 60(b) motion that are dispositive in the sense that if we win  
14 on any one of them, we win. This is one of them. If we show  
15 that the mistake was a business judgment where they changed  
16 their mind, 60(b) doesn't apply to that. It is true, as Your  
17 Honor has just pointed out, that Mr. Chikowski's recollection  
18 of what Mr. White said which would be admissible hearsay or not  
19 hearsay because it's the statement of a party opponent, would  
20 be admissible at trial to show that Barclays decided it did not  
21 want the contract for business reasons. We know Barclays is  
22 going to contend, because it is contending, that it's something  
23 other than business reasons. What Ms. Granfield said to Mr.  
24 White could, and likely would, based on what we know now, add  
25 to our case, perhaps dispositively, that they had a change in

1 business judgment. And that's what this was all about.

2 So what Mr. White told Mr. Chikowski is helpful to  
3 us. I haven't heard Your Honor say Mr. Bienenstock, that's  
4 enough, you win, you can go home. We need potentially more to  
5 prevail in this case and it's quite possible that what Ms.  
6 Granfield said to Mr. White is exactly what we need that Your  
7 Honor would say. I've heard enough. That does it. You don't  
8 have a case on 60(b). So we are prejudiced in not getting to  
9 the truth on that issue. There's no question.

10 And as I said, we're not asking Your Honor to open up  
11 the door to make the attorney/client privilege a game of  
12 roulette where people can't talk to attorneys because they're  
13 worried that it will come out some day. What we're asking, it  
14 would only come out if after the communication exists, the  
15 party asserting the privilege provides a declaration and one of  
16 its own people then blabs to an outside third party, in fact an  
17 adversary, what was said or at least part of what was said.  
18 That's the situation we have here. And we don't think there's  
19 any danger that a decision in our favor would erode the  
20 attorney/client privilege for those reasons. These were  
21 voluntary acts that Barclays committed for its own interest and  
22 now it doesn't want to have the consequences of being able to  
23 tell a half story and being forced to tell the whole story.  
24 Thank you.

25 THE COURT: Thank you. Mr. Feldberg, do you have a

1 little bit more?

2 MR. FELDBERG: Very briefly, Your Honor. I'm just  
3 reading from a portion of AmEx's motion, page 14, footnote 6,  
4 as to what they're seeking here: "This inquiry may encompass  
5 the disclosure of legal advice as well as facts communicated  
6 about the alleged mistake." In other words, the inquiry that  
7 AmEx's motion is seeking into, for example, the October 1  
8 conversation between Ms. Granfield and Mr. White is any facts  
9 they discussed, any legal advice rendered. That's what they're  
10 seeking. From our point of view, to use the phrase that's been  
11 used, whatever Mr. White blabbed to Mr. Chikowski --

12 THE COURT: It's a good phrase.

13 MR. FELDBERG: It is -- they're entitled to. They've  
14 asked Mr. White; we've asked Mr. Chikowski. The conversation  
15 between Mssrs. White and Chikowski is not privileged. And for  
16 whatever relevance it may turn out to have is fully  
17 discoverable. They're entitled to White's recollection. We're  
18 entitled to Chikowski's, etcetera. But that -- and that's the  
19 state of the record. Nothing that -- we've heard no case that  
20 has been presented in the briefs supports the notion that the  
21 communication between Granfield and White on October 1st opened  
22 the door to the inquiry AmEx is seeking. Thank you.

23 THE COURT: Mr. Feldberg --

24 MR. FELDBERG: Sure.

25 THE COURT: -- just before you sit down, I have a

1 somewhat unrelated thought. During the discovery phase of this  
2 hotly contested matter, were you asked on behalf of Barclays to  
3 identify all witnesses who have knowledge of facts sufficient  
4 to prove up your 60(b) claim?

5 MR. FELDBERG: Yes, we were.

6 THE COURT: Was Mr. White one of the witnesses  
7 identified for that purpose?

8 MR. FELDBERG: May I confer, Your Honor?

9 THE COURT: Yes.

10 MR. FELDBERG: Your Honor, Mr. White was listed in  
11 response to an interrogatory. And I don't have the exact words  
12 of the interrogatory in -- the question that was asked to which  
13 his name was included as part of the response. But it was  
14 included in the response.

15 THE COURT: All right. Without knowing the exact  
16 wording of the interrogatory that produced the witness list,  
17 he's on that list.

18 MR. FELDBERG: He's on -- I'm not sure -- Your Honor,  
19 I can't recall if it's a witness list or if it's a list of --

20 THE COURT: Of witnesses.

21 MR. FELDBERG: -- people with knowledge of certain  
22 things, Your Honor. For example, there's an interrogatory  
23 which I do recall which asked for who's responsible for the  
24 decision to remove the AmEx contracts from the list. And I  
25 remember the response to that and Mr. White's not one of those



1 people. I don't remember whether it's people with knowledge or  
2 people who were going to be called as witnesses. We can look  
3 that up and report back.

4 THE COURT: I'm not asking that you do any more work  
5 on this issue at this moment. I was just -- you've answered  
6 sufficiently for my purposes today.

7 MR. FELDBERG: Thank you.

8 THE COURT: What I'd like to have is the document  
9 that needs to be reviewed in camera.

10 MR. FELDBERG: Your Honor, what we propose to do, if  
11 it's acceptable to the Court, is in addition to the document  
12 that is the subject of this debate, which we would produce both  
13 in the form that it was originally produced, unredacted -- the  
14 redacted version, if Your Honor would accept it, we would also  
15 produce the e-mail from Lindsee Granfield to colleagues at  
16 Cleary and an in-house lawyer at Barclays which is the original  
17 text which was cut and pasted into the portion of the document  
18 that we've redacted out.

19 THE COURT: Let me understand something about that  
20 e-mail you've just referenced. I assume that e-mail is an  
21 otherwise responsive document to a discovery request made by  
22 AmEx which has been withheld on the basis of privilege and is  
23 on a privilege log, correct?

24 MR. FELDBERG: Yes, Your Honor.

25 THE COURT: Well, to the extent that it provides

1 meaningful context for what I'm being asked to look at, it  
2 seems to me that it's perfectly reasonable for me to look at  
3 it. But I'll ask if AmEx has any objection to my looking at  
4 it.

5 MR. BIENENSTOCK: No objection.

6 THE COURT: Great. Here's what we'll do. I'm  
7 confident I can read these documents in only a few minutes.  
8 And I probably will want to not only look at the documents but  
9 think a little bit about what I've looked at. So let's take  
10 about a fifteen minute break and we'll resume at -- let's call  
11 it 3:25.

12 MR. FELDBERG: May I approach, Your Honor?

13 THE COURT: You may. We're adjourned.

14 (Recess from 3:11 p.m. until 3:32 p.m.)

15 THE COURT: Be seated, please. Let me start with the  
16 redacted document which I've looked at. And I've looked at  
17 three documents: the original e-mail, which is dated September  
18 23, the unredacted version of the spreadsheet, which I have  
19 confirmed includes the text verbatim of the substantive  
20 portions of the e-mail, and the redacted document, which has  
21 effectively obliterated the entire text of that e-mail message.

22 In part because I've had the benefit of the original  
23 e-mail, which includes a distribution list that demonstrates  
24 this text was circulated to key members of Barclays' deal team  
25 in connection with the closing of the acquisition of Lehman

1 assets approved on September 20th, and this message was also  
2 generated more or less contemporaneously because it's dated  
3 just a couple of days later, I'm satisfied that this is a  
4 document that includes lots of information that AmEx would want  
5 to have available to help it in its case. But I'm also  
6 satisfied that the text should not be disclosed. There are a  
7 couple of reasons why I think that's so.

8 I believe that this fits the broad definition of work  
9 product. Conceivably, it could be in anticipation of  
10 litigation but I think that that's not the message here. The  
11 message here is attempting to resolve business differences,  
12 practically and amicably. Obviously, these efforts failed. To  
13 some extent, I view this as being akin to a document that in  
14 the ordinary course would be subject to a Federal Rule 408  
15 exemption. It's really talking about how the parties might be  
16 able to reconcile their differences and work things out.

17 Moreover, for Lindsee Granfield, who was the lead  
18 partner on the deal at the time for Cleary to be inhibited in  
19 her ability to communicate with members of her team, both  
20 internally and externally, would really be a problem from my  
21 perspective. E-mails like this are generated routinely in  
22 large law firms to facilitate the effective rendering of legal  
23 services to corporate clients and others. And I believe that  
24 it includes, based upon my reviewing of it, ways to try to  
25 resolve this matter.

1 It's either subject to an attorney/client privilege  
2 or it's subject to what I'm going to call a broad work product  
3 doctrine. But either way, I don't believe it should be  
4 discovered at this point. There may be other implications  
5 associated with this document which I would like to explore  
6 with counsel privately after this hearing.

7 Now, as for the broader issues of privilege and work  
8 product that have been extremely well briefed by both sides and  
9 extremely well argued by both sides, for reasons that I  
10 probably telegraphed in some of my questions during the  
11 argument, I believe that the White declaration that included  
12 passing reference to a conversation that he had with Lindsee  
13 Granfield on October 1, 2008 didn't open any doors, that Mr.  
14 White's statement which included the word "mistake" did not put  
15 that conversation at issue for purposes of attorney/client  
16 privilege. I viewed it much more as context than anything  
17 else. And I accept the Barclays arguments, while I've read  
18 each of the submissions and many of the attached documents in  
19 the declarations filed by Mr. Taub and Mr. Feldberg in support  
20 of their respective positions. I think that they reply  
21 memorandum most recently filed by Barclays represents, perhaps  
22 with the exception of some of the statements made with regard  
23 to work product, a statement of the case that I substantially  
24 adopt.

25 The motion is denied. To the extent that there is

1 any desire to seek further review of the denial of that motion,  
2 I will prepare a memorandum decision that lays out all of the  
3 reasoning in support of the position I've now expressed.  
4 However, just for purposes of clarity, while no doubt the  
5 decision that I would author would be my own prose, the legal  
6 reasoning would be substantially identical to what has been set  
7 forth in Barclays' reply memorandum of law that I've received  
8 recently. I note that that's filed under seal and is not  
9 generally available publicly. That's dated February 24.

10 I'm a little concerned about this case, too. I  
11 recognize that a tremendous amount of time and legal resources  
12 have been devoted to this particular aspect of the dispute  
13 between AmEx and Barclays. And it's obviously the privilege of  
14 counsel to pick the battles you consider worth fighting. But  
15 I'm left with the impression after all this that there's too  
16 much adversity in this case. It's your privilege if you want  
17 to keep fighting with each other but it seems shockingly  
18 different from the spirit of the e-mail that I just read in  
19 chambers. And that's one of the reasons why I'd like to have a  
20 chambers conference with counsel. Since you're here, I propose  
21 that we have it now. And I'll see you in the conference room  
22 which I think you're all familiar with across the hall from my  
23 chambers entrance in about five minutes. We're adjourned.

24 (Whereupon these proceedings were concluded at 3:44 p.m.)  
25

I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
AmEx's motion for an order compelling Barclays Capital to disclose in discovery communications between Lindsee Granfield of Cleary Gottlieb and Mr. White of Barclays Capital denied	44	25

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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LISA BAR-LEIB

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Date: March 2, 2009